

STATE OF MICHIGAN
COURT OF APPEALS

STEVEN PHILIP SMEAD,

Plaintiff-Appellant,

v

JESSICA DIONNE SMEAD

a/k/a JESSICA DIONNE LAPEKAS,

Defendant-Appellee.

UNPUBLISHED

April 28, 2009

No. 283066

Calhoun Circuit Court

LC No. 03-001849-DM

Before: Borrello, P.J., and Murphy and M. J. Kelly, JJ.

PER CURIAM.

Plaintiff challenges by delayed appeal the trial court's order denying his motion for change of domicile and a subsequent order denying his motion for rehearing. We vacate the trial court's orders and remand for further proceedings consistent with this opinion. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff and defendant were divorced on March 30, 2004. The judgment of divorce awarded sole legal and physical custody of the parties' two minor children, a son (DOB 6/3/00) and a daughter (DOB 9/3/02), to plaintiff, and it provided that parenting time for defendant was reserved. The judgment also provided that the children's domicile could not be removed from Michigan without the written approval of the court.

In April 2007, plaintiff moved to change the children's domicile to Arizona. Defendant filed a *pro per* motion for parenting time. The trial court denied both motions. With respect to plaintiff's motion, the trial court stated that it had considered the statutory factors in MCL 722.31(4) and did not find that the record established that a change of domicile was necessary to improve the lives of the children.

Plaintiff moved for rehearing, arguing, pursuant to *Spires v Bergman*, 276 Mich App 432; 741 NW2d 523 (2007), that in a case in which a parent seeking to change a child's domicile has sole legal custody of the child, the court need not consider the factors set out in MCL 722.31(4)¹

¹ These factors are commonly referred to as the "*D'Onofrio*" factors, given their enumeration in
(continued...)

before approving a change of domicile. The trial court denied the motion, stating that in a case in which a parent seeking to change a child's domicile has sole legal custody, *Spires* does not preclude a trial court from considering the factors.

We review a trial court's interpretation and application of statutes and court rules de novo on appeal. *Muci v State Farm Mut Auto Ins Co*, 478 Mich 178, 187; 732 NW2d 88 (2007). We review a trial court's findings of fact in regard to the *D'Onofrio* factors under the great weight of the evidence standard, *Brown v Loveman*, 260 Mich App 576, 600; 680 NW2d 432 (2004), and review the ultimate decision on a motion to allow a parent to remove a child from the state for an abuse of discretion, *Mogle v Scriver*, 241 Mich App 192, 202; 614 NW2d 696 (2000).

MCL 722.31 provides in pertinent part:

(1) A child whose parental custody is governed by court order has, for the purposes of this section, a legal residence with each parent. Except as otherwise provided in this section, a parent of a child whose custody is governed by court order shall not change a legal residence of the child to a location that is more than 100 miles from the child's legal residence at the time of the commencement of the action in which the order is issued.

(2) A parent's change of a child's legal residence is not restricted by subsection (1) if the other parent consents to, or if the court, after complying with subsection (4), permits, the residence change. *This section does not apply if the order governing the child's custody grants sole legal custody to 1 of the child's parents.*

* * *

(4) Before permitting a legal residence change otherwise restricted by subsection (1), the court shall consider each of the following factors, with the child as the primary focus in the court's deliberations:

(a) Whether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent.

(b) The degree to which each parent has complied with, and utilized his or her time under, a court order governing parenting time with the child, and whether the parent's plan to change the child's legal residence is inspired by that parent's desire to defeat or frustrate the parenting time schedule.

(...continued)

D'Onofrio v D'Onofrio, 144 NJ Super 200, 206-207; 365 A2d 27 (1976).

(c) The degree to which the court is satisfied that, if the court permits the legal residence change, it is possible to order a modification of the parenting time schedule and other arrangements governing the child's schedule in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent; and whether each parent is likely to comply with the modification.

(d) The extent to which the parent opposing the legal residence change is motivated by a desire to secure a financial advantage with respect to a support obligation.

(e) Domestic violence, regardless of whether the violence was directed against or witnessed by the child. [Emphasis added.]

In *Spires*, the plaintiff mother, who had sole legal and physical custody of the parties' child, moved to change the child's domicile to Texas. The trial court granted the motion, reasoning that because the plaintiff had sole legal custody of the child, MCL 722.31 did not apply, the court was not required to consider the factors enumerated in MCL 722.31(4), and it was obligated to grant the plaintiff's request to change the child's domicile. *Spires, supra* at 434-435.

On appeal, the defendant argued that the common law and MCR 3.211(C) required the trial court to consider the *D'Onofrio* factors prior to ruling on the motion to change the child's domicile. The *Spires* Court disagreed, stating:

"By its language, MCL 722.31 specifically applies to all cases in which a parent wishes to change the legal residence of a child 'whose custody is governed by court order'" *Grew v Knox*, 265 Mich App 333, 338; 694 NW2d 772 (2005). The Michigan Legislature has specifically codified the change-of-domicile factors enumerated in *D'Onofrio, supra*, at MCL 722.31(4). *Rittershaus v Rittershaus*, 273 Mich App 462, 465; 730 NW2d 262 (2007). When the parents share joint custody and one parent is seeking permission to relocate more than 100 miles away, the family court must consider the factors of MCL 722.31(4). *Rittershaus, supra* at 465. However, when the parent seeking the change of domicile has sole legal custody of the child, MCL 722.31 does not apply, and the court need not consider the factors enumerated in subsection 4. MCL 722.31(2); see also *Rittershaus, supra* at 465. In the present case, it is undisputed that plaintiff had sole legal custody of the child at the time of the proceedings below. Accordingly, MCL 722.31 did not govern plaintiff's request to change the child's domicile, and the family court properly declined to consider the factors of MCL 722.31(4). [*Spires, supra* at 436-437 (footnote omitted; omission in original).]

The defendant in *Spires* argued that even if MCL 722.31 did not apply, the trial court had a common law duty to consider the *D'Onofrio* factors prior to ruling on the motion to change the child's domicile. The *Spires* Court disagreed, ruling:

Even assuming *arguendo* that it was customary before the enactment of MCL 722.31 to consider the *D’Onofrio* factors in change-of-domicile matters wherein one parent had sole legal custody, the plain language of MCL 722.31(2) has altered any such practice. Use of the *D’Onofrio* factors in change-of-domicile cases is not exclusively controlled by MCL 722.31, and the language of MCL 722.31(2) plainly provides that “[t]his section does not apply if the order governing the child’s custody grants sole legal custody to 1 of the child’s parents.” Defendant’s argument that the family court was required by common law to apply the *D’Onofrio* factors, despite the express statutory exemption for parents with sole legal custody, is unsupported by Michigan law. [*Spires, supra* at 438.]

In the instant case, the trial court maintained that *Spires* did not preclude it from considering the *D’Onofrio* factors when a parent having sole legal custody seeks to change the domicile of a child. The statement in *Spires* upon which the trial court relied for its position is, “However, when the parent seeking the change of domicile has sole legal custody of the child, MCL 722.31 does not apply, and the court need not consider the factors enumerated in subsection 4.” *Spires, supra* at 437. As is evident, the statement by the *Spires* panel that the trial court “need not consider” the factors enumerated in MCL 722.31(4) follows the statement that “MCL 722.31 does not apply” when the parent seeking a change of the child’s domicile has sole legal custody. Read in context and given the ultimate outcome, it is abundantly clear that the *Spires* panel did not hold that in a case in which MCL 722.31 does not apply, the trial court still retains the discretion to apply the factors enumerated in MCL 722.31(4) when deciding a motion to change a child’s domicile. The trial court in this case misinterpreted *Spires* when it concluded to the contrary.

MCR 3.211(C) reads in pertinent part:

(C) A judgment or order awarding custody of a minor must provide that

(1) the domicile or residence of the minor may not be moved from Michigan without the approval of the judge who awarded custody or the judge’s successor.

* * *

(3) a parent whose custody or parenting time of a child is governed by the order shall not change the legal residence of the child except in compliance with section 11 of the Child Custody Act, MCL 722.31.

The *Spires* panel held that the trial court had complied with MCR 3.211(C) by determining that MCL 722.31 did not apply and then approving the plaintiff’s request to change the child’s domicile without further inquiry. *Spires, supra* at 438-440. In this case, the parties’ judgment of divorce provided that the children’s domicile could not be removed from Michigan without the approval of the court. Plaintiff sought the approval of the trial court to change the children’s domicile to Arizona. Had the trial court interpreted and applied *Spires* correctly, it

would have concluded that because plaintiff had sole legal custody of the children, MCL 722.31 did not apply and analysis of the *D'Onofrio* factors was not proper.

We vacate the trial court's original order denying plaintiff's motion for change of domicile and the trial court's order denying rehearing, and we remand this case to the trial court for entry of an appropriate order granting plaintiff's motion. We do not retain jurisdiction.

/s/ Stephen L. Borrello

/s/ William B. Murphy

/s/ Michael J. Kelly